

TIPCO ASPHALT PUBLIC COMPANY LTD & ANOR**A****v.****ARAS JALINAN SDN BHD & OTHER APPEALS**

COURT OF APPEAL, PUTRAJAYA

B

SYED AHMAD HELMY JCA

ZAHARAH IBRAHIM JCA

MOHAMAD ARIFF YUSOF JCA

[CIVIL APPEALS NO: W-02(IM)-696-03-2012,
W-02(IM)-733-04-2012 & W-02(IM)-816-04-2012]**C**

3 SEPTEMBER 2013

CIVIL PROCEDURE: *Striking out - Application for - Petition under s. 181 Companies Act 1965 - Whether obviously unsustainable - Reference to arbitration - Similar issues ventilated during arbitration - Allegation of - Whether issue of res judicata arose - Final arbitration award - Whether arbitration clause could oust statutory jurisdiction under s. 181 - Whether intercession of final award altered essential nature of interlocutory applications - Whether hearing of petition prejudiced appellants - Rules of the High Court 1980, O. 18 r. 19(1)*

D**E**

On 24 April 2008, the respondent filed a petition under s. 181 of the Companies Act 1965 ('s. 181') as a result of a shareholders' dispute which arose between the parties. On 12 May 2008, the first and second appellants made a reference to arbitration. The appellants then filed an application under O. 18 r. 19(1)(b) and/or (d) of the Rules of the High Court 1980 to strike out the respondent's petition. The appellants' application was allowed by the High Court and in furtherance to that, the court also dismissed the respondent's application to amend the petition. The Court of Appeal, however, allowed the respondent's appeal and ordered that the respondent's petition be reinstated. It was held that the respondent could not be denied its statutory remedy under s. 181 since the cause of action in the arbitration proceedings was in relation to a breach of contract and the cause of action in the petition was in relation to a s. 181 oppressive conduct or unfair discrimination. The appellants' applications for leave to appeal to the Federal Court was dismissed. Thereafter, a second round of applications to strike out the respondent's petition was filed but the High Court Judge dismissed the said applications on the grounds that the court was bound by the

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- A decision of the Court of Appeal and the Federal Court. Dissatisfied, the appellants appealed to this court and it was contended that the issue of *res judicata*, as applied by the learned High Court Judge, could not apply on the facts of these appeals, since there was a distinct distinguishing factor between the first and second set of setting aside applications *ie*, when the first round of applications were heard, these applications were made on the basis that there were then on-going arbitration proceedings whereas, when the present applications were filed, the arbitration had been concluded and a final award was published. It was further submitted, *inter alia*: (i) that the arbitration award had given rise to *res judicata* on the amended petition because the facts, issues, complaints and reliefs in the amended petition had been ventilated in the arbitration; and (ii) that an arbitration award was final and binding under s. 36 of the Arbitration Act 2005.
- D Submitting, among others, on the basis that the petition was grounded on s. 181, where wide forms of reliefs were made available, the respondent alleged that the petition under s. 181 was filed first in point of time and the arbitral tribunal did not decide on company law matters.

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Held (dismissing appeals with costs)

Per Mohamad Ariff Yusof JCA delivering the judgment of the court:

- F (1) The High Court Judge was correct in exercising her discretion to dismiss the second round of striking out applications on the ground that she was bound by the judgment of the Court of Appeal and the Federal Court. The intercession of the final award, being made after the Court of Appeal and the Federal Court's decisions, did not alter the essential nature of the interlocutory applications. The appellants still had to show a very clear and convincing case that the petitioner's case was obviously unsustainable whereby the case must be that it was not only not sustainable, but it must be obviously so. On the facts, the amended petition was not obviously unsustainable. (paras 13 & 34)
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- I (2) The question of whether an arbitration clause can oust the statutory jurisdiction under s. 181, whether wholly or in part, could not be realistically determined with finality in an interlocutory appeal. Further, the appellants were free to raise their grounds in the hearing of the petition and still rely on s. 36(1) of the Arbitration Act 2005. (paras 35 & 36)

- (3) It would be up to the appellants to persuade the High Court hearing the petition on which parts of the final award were *res judicata*. In the instant case, this court was not persuaded that the dismissal of the appeals would occasion any immediate prejudice to the appellants, or that the hearing of the petition on the merits would be an exercise in futility. (para 37)

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Bahasa Malaysia Translation Of Headnotes

Pada 24 April 2008, responden telah memfailkan satu petisyen di bawah s. 181 Akta Syarikat 1965 ('s. 181') akibat pertikaian pemegang saham yang berbangkit di antara pihak-pihak. Pada 12 Mei 2008, perayu-perayu pertama dan kedua telah membuat rujukan ke timbang tara. Perayu-perayu kemudian telah memfailkan permohonan di bawah A. 18 k. 19(1)(b) dan/atau (d) Kaedah-Kaedah Mahkamah Tinggi 1980 untuk membatalkan petisyen responden. Permohonan pihak perayu dibenarkan oleh Mahkamah Tinggi dan selanjutnya, mahkamah telah menolak permohonan responden untuk meminda petisyennya. Mahkamah Rayuan, bagaimanapun membenarkan rayuan responden dan mengarahkan agar petisyen responden dihidupkan semula. Adalah diputuskan bahawa responden tidak boleh dinafikan daripada remedi statutorinya di bawah s. 181 memandangkan kausa tindakan dalam petisyennya berkaitan dengan suatu kelakuan menindas atau diskriminasi tidak adil di bawah s. 181. Permohonan pihak perayu untuk kebenaran merayu ke Mahkamah Persekutuan telah ditolak. Selepas itu, pihak perayu telah memfailkan permohonan untuk membatalkan petisyen responden bagi kali kedua tetapi Hakim Mahkamah Tinggi telah menolak permohonan tersebut atas alasan bahawa mahkamah terikat dengan keputusan Mahkamah Rayuan dan Mahkamah Persekutuan. Tidak puas hati, perayu-perayu telah merayu ke mahkamah ini dan adalah diujahkan bahawa isu *res judicata*, seperti dipakai oleh yang arif Hakim Mahkamah Tinggi, tidak boleh digunakan atas fakta rayuan-rayuan di sini, memandangkan terdapat perbezaan ketara di antara permohonan pengenejian kali pertama dan kali kedua, iaitu, apabila permohonan kali pertama dibicara, permohonan-permohonan dibuat atas dasar bahawa prosiding timbang tara masih berjalan manakala, apabila permohonan di sini difailkan, timbang tara telah pun selesai dan award muktamad telah diterbitkan. Juga diujahkan, antara lain, (i) bahawa award timbang tara telah menyebabkan *res judicata*

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- A terhadap petisyen terpinda kerana fakta-fakta, isu-isu, aduan dan relif dalam petisyen terpinda telah pun diputuskan semasa timbang tara; dan (ii) bahawa award timbang tara adalah muktamad dan mengikat di bawah s. 36 Akta Timbang Tara 2005. Menghujah, antara lain, atas dasar bahawa petisyen adalah berpandukan
- B s. 181, di mana relif yang luas boleh diperolehi, pihak responden menyatakan bahawa petisyen di bawah s. 181 telah difailkan terlebih dahulu dan tribunal timbang tara tidak memutuskan hal berkenaan undang-undang syarikat.
- C **Diputuskan (menolak rayuan-rayuan dengan kos)**
Oleh Mohamad Ariff Yusof HMR menyampaikan penghakiman mahkamah:
- D (1) Hakim Mahkamah Tinggi telah melaksanakan budi bicara beliau dengan betul apabila permohonan-permohonan pembatalan kali kedua atas alasan bahawa beliau terikat dengan penghakiman Mahkamah Rayuan dan Mahkamah Persekutuan. Kemasukan award muktamad, yang dibuat selepas keputusan Mahkamah Rayuan dan Mahkamah Persekutuan, tidak menukar sifat penting permohonan-permohonan interlokutori. Pihak perayu
- E masih perlu menunjukkan satu kes yang jelas dan memuaskan bahawa kes pempetisyen dengan jelasnya tidak boleh dipertahankan di mana kes itu bukanlah hanya tidak boleh dipertahankan, tetapi ia mesti adalah ternyata sebegitu.
- F Berdasarkan fakta, petisyen terpinda tidaklah dengan jelasnya tidak boleh dipertahankan.
- G (2) Persoalan luas sama ada klausa timbang tara boleh menyingkir bidang kuasa statutori di bawah s. 181, sama ada secara keseluruhan atau sebahagiannya, tidak boleh ditentukan dengan muktamad semasa rayuan interlokutori. Tambahan, perayu-perayu bebas untuk membangkitkan alasan mereka semasa pendengaran petisyen dan masih boleh bergantung kepada s. 36 (1) Akta Timbang Tara 2005.
- H (3) Adalah atas pihak perayu untuk memuaskan Mahkamah Tinggi semasa pendengaran petisyen berkenaan bahagian manakah award muktamad adalah *res judicata*. Dalam kes ini, mahkamah tidak puas hati bahawa penolakan rayuan-rayuan akan menyebabkan sebarang prejudis kepada pihak perayu, atau pun
- I pendengaran petisyen atas merit merupakan pelaksanaan yang tidak berguna.

Case(s) referred to:

- ACD Tridon v. Tridon Australia* [2002] NSWSC 896 (**refd**) A
- Akitek Tenggara Sdn Bhd v. Mid Valley City Sdn Bhd* [2007] 6 CLJ 93 FC (**refd**)
- Aras Jalinan Sdn Bhd v. Tipco Asphalt Public Company Ltd & Ors* [2011] 8 CLJ 830 CA (**refd**)
- Bandar Builder Sdn Bhd & 2 Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 SC (**refd**) B
- Econ Piling Ltd v. Shanghai Tunnel Engineering Co Ltd* [2010] SGHC 253 (**refd**)
- Exeter City AFC Ltd v. Football Conference Ltd* [2004] EWHC 2304 (**refd**)
- Fulham Football Club (1987) Ltd v. Richards* [2012] 1 All ER 414 (**refd**) C
- Jan De Nul NV & Ors v. Inai Kiara Sdn Bhd* [2006] 3 CLJ 46 CA (**refd**)
- Skylark Jaya Sdn Bhd & Ors v. Pengarah Jabatan Tanah Dan Ukur Sabah & Ors* [2011] 1 LNS 578 HC (**refd**)

Legislation referred to:

- Arbitration Act 2005, s. 36(1) D
- Companies Act 1965, s. 181
- Rules of the High Court 1980, O. 18 r. 19(1)(b), (d)
- (Civil Appeal No: W-02(IM)-696-03-2012)
- For the appellants - Lim Chee Wee & Kamraj Nayagam; M/s Skrine
- For the respondent - Dhinesh Bhaskaran; M/s Shearn Delamore & Co E
- (Civil Appeal No: W-02(IM)-733-04-2012)
- For the appellants - Gopal Sreenevasan; M/s Sreenevasan Young
- For the respondent - Dhinesh Bhaskaran; M/s Shearn Delamore & Co
- (Civil Appeal No: W-02(IM)-816-04-2012) F
- For the appellant - Low Chi Cheng (Sharifah Nadia Al-Jafri with her); M/s Lim Kian Leong & Co
- For the respondent - Dhinesh Bhaskaran; M/s Shearn Delamore & Co
- [Appeal from High Court, Kuala Lumpur; Originating Petition No: D3-26-32-2008] G

Reported by Kumitha Abd Majid

JUDGMENT

Mohamad Ariff Yusof JCA:

Procedural Background

[1] There were three related appeals from the decision of the High Court Judge in relation to three separate applications under O. 18 r. 19(1)(b) and/or (d) of the Rules of the High Court 1980 I

- A to strike out the respondent's Originating Petition in Suit
No. D3-26-32-2008 (brought under s. 181 of the Companies Act
1965). All three appeals before us were heard together. The High
Court had dismissed all three applications on the ground of *res*
judicata. These three separate applications were the second set of
B applications instituted, the first three applications being filed earlier.

**First Round Of Setting-aside Applications And Earlier
Order Of Court Of Appeal**

- C [2] The first three applications had earlier been allowed by the
High Court. Aside from striking out the petition, the High Court
also dismissed the respondent's application to amend the petition.
The decision of the High Court was appealed against to the
Court of Appeal which allowed the appeal, and ordered the
D reinstatement of the petition. Applications for leave to appeal to
the Federal Court were then filed. These were also dismissed by
the Federal Court. The Court of Appeal provided full grounds for
its judgment which is now reported as *Aras Jalinan Sdn Bhd v.*
Tipco Asphalt Public Company Ltd & Ors [2011] 8 CLJ 830; [2012]
E 1 MLJ 510. The Court of Appeal held that the petition under
s. 181 for "oppression" and "unfair discrimination", was not
obviously unsustainable, ordered the reinstatement of the petition,
reversed the decision of the High Court on the amendment of the
petition, and finally ordered that the petition "is to be heard on
F its merits".

The Dispute In Summary

- G [3] The dispute between the parties forming the subject matter
of the petition concerns a shareholders' dispute between the
respondent (Aras Jalinan Sdn Bhd; hereinafter "AJSB") and the
group described as the TASCOS Group, comprising the 1st and
2nd appellants (Tipco Asphalt Public Company Limited and Thai
Bitumen Company Limited; hereinafter "Tipco" and "TBC" or "the
TASCOS Group"). The business relationship was formed through
H two corporate vehicles (Kemaman Oil Corporation Sdn Bhd and
Kemaman Bitumen Company Sdn Bhd (hereinafter "KOC" and
"KBC"). The TASCOS Group and AJSB were ultimately to have a
parity of shareholding and management control in KOC which is
the holding company of KBC, which latter company was the
I vehicle through which the parties had intended (as a joint venture,
contended AJSB) to carry on the business of constructing a
bitumen and asphalt plant and to carry on the business of bitumen/
asphalt production.

[4] Arising from a settlement agreement, and a number of other related agreements, between AJSB, the TASCOT Group, TBC, KOC, KBC and another party named as Seloga Holdings Berhad (a party not directly relevant for the purposes of these appeals), AJSB was given the right to subscribe for further shares in KOC to bring its status to parity with that of the TASCOT Group by a defined date, ie, 31 March 2008.

[5] The TASCOT Group claimed AJSB had failed to fulfil its contractual obligations to pay and acquire these additional shares by the stipulated date, and therefore the TASCOT Group had the right, or so it contended, to appoint additional directors to the Board of KOC. There were also issues relating to the TASCOT group's right to exercise its call option over the shares of KOC and the validity of a shareholder's loan request by the TASCOT group.

[6] As summarised by counsel for the appellants in Appeal No. 696, Mr Lim Chee Wee, there were five stages during which AJSB was to come up to parity in shareholding with the TASCOT Group. There was delayed payment and a refusal to purchase additional shares from the TASCOT Group. When AJSB paid late, the TASCOT Group took steps to appoint additional directors in KOC arising from the terms of the settlement agreement. This was the essence of the dispute between the parties.

[7] It is unnecessary for present purposes to delve into minute detail on the facts of the present dispute, save to highlight that the petition is based on oppressive and unfair conduct, allegedly of the TASCOT Group against its co-shareholder, AJSB, in KOC. It is not a claim for breach of contract *per se*.

The Reliefs Sought In The Present Petition Under s. 181

[8] The foundation of the claims can be seen in para. 16 of the amended petition:

16. The Petitioner states as follows:

- a. KOC's affairs are being conducted in a manner oppressive to AJSB or in disregard of AJSB's interests as a member of KOC;
- b. The powers of the 3rd to 6th respondents namely the nominees of TASCOT and TBC on the Board of Directors of KOC are being exercised in a manner oppressive to AJSB or in disregard of AJSB's interests as a member of KOC;

- A c. Acts of KOC have been done or threatened to be done which unfairly discriminates against or are otherwise prejudicial to AJSB; and
- d. Resolutions of members of KOC are proposed which unfairly discriminates against or are otherwise prejudicial to AJSB.
- B

[9] In the petition, the 3rd to 6th respondents (Thierry Alain, Somchit Serthin, Jacques Marcel Pastor and Chaiwat Srivalwat) are sued in their capacity as directors of KOC. The 7th respondent (Abdul Malik Tahir) is brought in as a party in his capacity as the Chief Executive Officer of KBC.

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The Sequence Of Dates

[10] The sequence of dates is of importance in these present appeals. The petition itself was filed on 24 April 2008, the reference to arbitration by the 1st and 2nd appellants (the “TASCO Group”) on 12 May 2008, the High Court’s decision in the first set of striking out applications was given on 6 June 2008, the Court of Appeal decision rendered its decision reversing the High Court on 11 January 2011, and the application for leave to appeal to the Federal Court was dismissed on 20 September 2011.

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[11] As for the arbitration proceedings, the Arbitral Tribunal framed its terms of reference on 8 June 2009, heard evidence from 8 February 2010 to 10 February 2010 and proceedings were declared closed on 18 June 2010. The final award was given on 16 May 2011.

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The Second Round Of Proceedings

[12] When the second round of applications came again before the High Court, the learned High Court Judge held she was bound by the decisions of the Court of Appeal and the Federal Court. The learned High Court Judge held:

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H This Court is bound by the decision of the Court of Appeal and the Federal Court. This Court is duty bound to hear the amended Petition. This 2nd striking out application is seen as an attempt to delay hearing of the Petition, to circumvent the order of the Court of Appeal, is clearly oppressive in nature and amounts to an abuse of the court’s process. The 1st to 7th Respondents must be stopped from raising the same argument again. Why can’t the Respondents (the Appellants here) accept and respect the Court of Appeal’s ruling that the Petitioner must be given an opportunity to be heard ...

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This judgment of the High Court is dated 15 March 2012.

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This Court's Decision

[13] We were of the view, in these present appeals, that the learned High Court Judge had correctly exercised her discretion. These appeals concerned a striking out matter under O. 18 r. 19(1) and therefore it was plain that the only real issue was whether the amended petition was obviously unsustainable. We found the amended petition was not obviously unsustainable and therefore dismissed the appeals with costs of RM30,000 for Appeal No. W-02(IM)-696-03-2012 and RM5,000 for each of the other two appeals.

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The Arguments Of The Parties

For The Appellants

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[14] It was argued by the appellants that the issues raised in the petition and the issues raised and decided in the arbitration (an ICC Arbitration held in Singapore before three arbitrators) were the same. We were not persuaded by the argument by the appellants that these appeals concerned an immediate important issue of whether a Malaysian Court would allow a party to an international arbitration award to re-litigate in a domestic court the reliefs and complaints raised by that party in the international arbitration. As formulated by Mr Lim, counsel for the appellants in Appeal No. 696, the issue posed was: "In other words, will a Malaysian court allow a party to challenge an international arbitration award by a collateral or back-door attack in a domestic court, instead of a setting aside application (meaning a setting aside of the arbitral award)?"

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[15] The appellants sought to argue that *res judicata* as applied by the learned High Court Judge could not apply on the facts of these appeals, since there was a distinct distinguishing factor between the first set of setting aside applications and the second, that is, when the first round of applications were heard, these applications were made on the basis that there were then ongoing arbitration proceedings between the parties on the same facts, the same issues and the same reliefs. When these present applications were filed, the arbitration had concluded and a final award published. Mr Lim Chee Wee argued that there were five reasons why the appeal of his client should be allowed. First, an arbitration award is final and binding under s. 36 of the Arbitration

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- A Act 2005, the common law and the contract itself. Secondly, the arbitration award had given rise to *res judicata* on the amended petition because the facts, issues, complaints and reliefs in the amended petition had been ventilated in the international arbitration, giving rise to the award. Thirdly, company law or
- B shareholders' disputes are arbitrable. Fourthly, there was a distinction between the striking out in the present appeal and the earlier striking out in the High Court; in the first striking out, the final award did not exist. Fifthly, the High Court did not at all consider the contents of the amended petition and the final award.
- C [16] Mr Lim provided a very detailed and comprehensive submission, with a meticulous table of comparison between what was pleaded in the amended petition as opposed to the terms of reference, the memorials in reply by the respondent in the
- D arbitration, and the findings in the arbitration award. The respondent in this appeal was the 1st respondent in the arbitration, the 2nd respondent in the arbitration being Kemaman Oil Corporation Sdn Bhd.
- E [17] The details of the comparison are stated in appendix 3 of the appellant's written submission in Appeal No. 696. To take one example, para 17 in the amended petition reads:
- F Further, TASCO and TBC entered into the Settlement Agreement in bad faith. TASCO and TBC had no intention to implement the Settlement Agreement, but instead, merely used the Settlement Agreement as an instrument to secure funds from AJSB for the working capital requirements of KOC, and thereafter to take over the management and control of KOC.
- G [18] In paras. 5, 6, 7 and 16 of the memorials in reply and the closing memorials, the respondent argued:
- H ... in essence, what happened in this case was that TASCO and TBC embarked on a concerted plan to persuade AJSB to part with RM63,650,001.00, with the promise that AJSB would achieve parity of shareholding and equality in management. (para 5, Memorials in Reply)
- I "However, this was never TASCO's and TBC's intention. Instead, they intended all along to seize control of KOC and KBC, utilizing the device of the FCSA in circumstances in which the FCSA was never intended to operate." (para 6, Memorials in Reply)

After breaching the Settlement Agreement, TASC0 and TBC then deliberately set out to systematically increase their shares in both KOC and KBC to create a scenario where they could try and persuade the Tribunal not to unravel the fruits of their wrongdoing under the pretext of “too much has happened by now.” (para 7, Memorials in Reply)

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The aforesaid sequence of events shows without doubt that TASC0 and TBC were acting in bad faith with the intent of defeating the venture. Rather than make the venture work by accepting the RM5,000,000.00 and issuing the 5,000,000 shares, TASC0 and TBC took every possible opportunity to tilt the balance in their favour. (para 16, Closing Memorials)

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[19] Compare the findings in the award:

The Tribunal finds that AJSB breached Clause 4.1.1 of the Settlement Agreement. (para 53)

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Given the factual matrix and the dispute as set out by TASC0 Group (which AJSB does not deny), the Tribunal finds that one of the intentions behind the Settlement Agreement was to give AJSB one last chance, subject to strict timelines, to match TASC0 Group’s investment. (para 66)

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The Tribunal also finds that creating equality in shareholding and management between TASC0 Group and AJSB was also one of the objectives behind the Settlement Agreement. This latter finding is also supported by the presence of Clause 6 (especially Clauses 6.3 and 6.4) of the Settlement Agreement. (para 66)

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The Tribunal takes the view that the proper characterisation of Clause 4.1.1 is that it is a condition of the Settlement Agreement, a breach of which entitles the non-defaulting party to either a repudiation of contract and/or damages. (para 68)

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TASC0’s Group’s requisition of 29th February 2008 was a breach of TASC0’s implied obligation under the Settlement Agreement to refrain from any action which might prevent AJSB from obtaining equal management participation and control in KOC before 31 March 2008 if AJSB performed all the obligations listed out under Clause 6.4. (para 117)

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[20] Whilst it was superficially very convincing, we were also aware that the Arbitration Tribunal did not find totally in favour of the claimants’ claims, the claimants being Tipco Asphalt and Thai Bitumen, and to ascertain the true position would require a detailed consideration of the merits of the claims, between those in the pleadings in the petition and those in the arbitration award.

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A In short, it would require a trial on the affidavits - a course of action wholly inappropriate when considering a striking out application.

B [21] We were also mindful that AJSB had counter-claimed in the arbitration; some of its claims were allowed, some disallowed by the Arbitral Tribunal.

C [22] Nevertheless, Mr Lim argued strongly that since the award had made certain definite findings these were *res judicata*. *Res judicata* applied equally in relation to a decision of an Arbitral Tribunal (*Akitek Tenggara Sdn Bhd v. Mid Valley City Sdn Bhd* [2007] 6 CLJ 93; [2007] 5 MLJ 697; *Skylark Jaya Sdn Bhd & Ors v. Pengarah Jabatan Tanah Dan Ukur Sabah & Ors* [2011] 1 LNS 578; *Econ Piling Ltd v. Shanghai Tunnel Engineering Co Ltd* [2010] SGHC 253).

D [23] The issue of the alleged fiduciary relationship had been dealt with in the arbitration and it was expressly found in the final award that there was no joint venture relationship and any implied duty of good faith did not exist on the facts. Reference was made to para. 250 of the final award in support of this argument:

E The Tribunal makes no comment over whether the test for joint venture is the same under Malaysian law as under Australian law. However, even adopting Malaysian law (which arguably sets a lower threshold), the Tribunal finds that AJSB has not established that the business arrangements between Tasco and AJSB is one that involves a fiduciary relationship between the parties, which would impose fiduciary duties (including the duty of good faith) on the parties to the arrangements. Consequently, no fiduciary duties are involved and Tasco do not owe AJSB any joint-venture duty of good faith.

F [24] As Mr Lim described it, since the essential facts have been adjudicated upon and established in the arbitration proceedings, there was no reason to allow AJSB to have “a fun day out in the park”.

G [25] In the same vein, Mr Gopal Sreenevasan, counsel for the appellants in Appeal No. 733, argued that this court should be addressing the facts that gave rise to the cause of action, and the facts in the arbitration proceedings and the present petition were

the same. There must be some purpose for going to trial, contended counsel. The material facts had already been determined in the arbitration.

[26] The Court of Appeal in the previous appeal had drawn a distinction between the cause of action in this petition and the arbitration proceedings. So did the learned High Court Judge when dismissing the applications to strike out this petition in the second round of applications. It was held that whereas the cause of action in the arbitration proceedings related to breach of contract, the cause of action in the petition related to a s. 181 oppressive conduct or unfair discrimination. The Court of Appeal even went further to say that the petitioner could not be denied its statutory remedy under s. 181 of the Companies Act 1965, holding:

The s. 181 of the Companies Act remedy is a statutory remedy. The Petitioner cannot be deprived of this statutory remedy nor denied of it by reason of the Petitioner having resorted to resolving some of the issues, forming the basis of the Petition, in arbitration proceedings, and/or any unsuccessful applications in a civil court for interim injunctions to prevent the holding and/or calling of an extraordinary general meeting of the company to appoint new nominee directors by the 1st and 2nd Respondent, on the board of the 8th Respondent, pending the outcome of arbitration proceeding. (At paragraph 8 of the report judgment, page 515)

[27] Mr Lim's response to this was that everything was arbitrable under Arbitration Act of 2005, save in very exceptional cases. In reference to reliefs under the Companies Act, the New South Wales Supreme Court decision in *ACD Tridon v. Tridon Australia* [2002] NSWSC 896, was cited for the proposition that there was no ground in public policy to disallow a reference to arbitration merely because a matter came under the Companies Act, in the case of Australia, the Corporations Act. The following passages in the judgment of the New South Wales Supreme Court were cited:

I accept, as well, that public policy considerations operate against referring to arbitration a determination to wind up the company on the grounds upon which the court may order that the company be wound up. However, I would not regard these public policy considerations as preventing parties to a dispute from referring questions arbitration merely because those questions arise under

A the Corporations Act. I see nothing special about the Corporations Act that would distinguish it, as a whole, from other legislation ...

B The statutory powers of the court under the Corporations Act are, generally speaking, comparable to the powers exercised by court under the general law (the power to make a winding up order being an exception to this proposition). They are generally not special powers to be exercised having regard to specialist public interest criteria.

C Specifically, the public policy considerations held ... to be applicable to a disputed claim to wind up the company did not seem to me to prevent the parties from referring to arbitration the claim for some merely *inter partes* relief under the oppression provisions of the Corporations Act ... (At paragraphs 192 to 194 of the reported judgment, per Austin J)

D [28] It is worthwhile to note that even going by the judgment in this New South Wales Supreme Court case, there could be some subject matters which might be non-arbitrable on public policy grounds. The relief for winding up was singled out by the Australian Court. Therefore, we were not persuaded that at this stage of an interlocutory appeal, the authorities cited by the appellants had established a clear and obvious case of the subject matter and reliefs sought in the petition being obviously unsustainable.

F **For The Respondent**

G [29] We were more persuaded by the position adopted by the respondent, as argued by Mr Dinesh Baskharan, who advanced a more convincing case and argued on the basis that the very same arguments being advanced before us had been advanced earlier before the High Court, the Court of Appeal and the Federal Court. All in all, the same arguments have been raised a total of five times. It was impressed upon us that when the appeal before the Court of Appeal was heard on 11 January 2011, the hearing in the arbitration had been completed, and only the award had not been issued. According to Mr Dinesh, these present appeals raise a pure and simple case on one issue - were the appellants entitled to file a second set of striking out applications after the Court of Appeal had dismissed the earlier striking out applications and the Federal Court had dismissed the application for leave to appeal?

[30] The petition is grounded on s. 181 petition where very wide forms of reliefs are made available, to include a buyout by the majority shareholders of the minorities' shareholding. If need be, contended counsel, the petitioner might be amending the petition to include a buyout relief, and should not be precluded from so doing by having the petition summarily struck out in defiance of the earlier Court of Appeal judgment that the petition be reinstated and reheard.

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[31] Counsel cited the Federal Court position in *Jan De Nul NV & Ors v. Inai Kiara Sdn Bhd* [2006] 3 CLJ 46 where the Federal Court accepted that when looking at an applicable arbitration clause, if any claim should be of a contractual nature, this arbitration clause could not oust the claim being made in a suit premised on tort. Paragraph 25 of the judgment of the Federal Court was cited:

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... We are also of the view that it cannot be correct to say that once there is an arbitration clause in an agreement the parties thereto are obliged to go for arbitration to resolve all the disputes irrespective of their nature. We are thus inclined to follow the approach taken by the Full Court in *Hi-Fert Pty Ltd's* case ... In that if the dispute between the parties is of non-contractual nature it is not come within the scope of the arbitration clause. In that case the claims as pleaded included misrepresentation in breach of the Trade Practices Act 1974 and they were not considered as contractual in nature. (Per Richard Malanjum JCA (as His Lordship then was))

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[32] Counsel also emphasised what was to us a very relevant point; the petition under s. 181 was filed first in point of time. In the arbitration, the Arbitral Tribunal did not decide on company law matters. Indeed, at several junctures in the final award, the tribunal drew attention to matters which could be best resolved by the Malaysian courts. Paragraphs 274, 286 and 288 of the final award were drawn to our attention:

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274. With respect to the second and third of Aras' three requests for relief, *viz.* an order that KOC return to the Claimants all monies paid by the Claimants pursuant to Clause 4A of the Settlement Agreement and an order that any shares issued by KOC to the Claimants pursuant to Clause 4A of the Settlement Agreement be cancelled forthwith by KOC, the Tribunal declines to grant these orders as they are essentially orders for capital

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A reduction and share cancellation, *which are remedies not available in common law or equity, and are not within the jurisdiction of this Tribunal. They are matters for the Malaysian Court under the Malaysian Companies Act, as a company is a creature of statute ...*

B 286. The Tribunal also rejects Aras' request for various declarations that various subscriptions/conversions/transfers of shares by the Claimants in KOC and KBC are invalid and in breach of the Settlement Agreement and an order that the said shares be cancelled. The Tribunal does so on the following grounds:

C 286. 1. **The Tribunal does not have the power or jurisdiction to cancel shares, which is a matter within the exclusive province of the Malaysian Court ...**

D 288. 2. *Aras has not demonstrated satisfactorily to the Tribunal that it has the power or jurisdiction to order a share buy-out which is primarily a matter within the jurisdiction of the Malaysian Court.* (emphasis added)

E [33] As for the positions of the appellants in Appeals No. 816 and 733, they are necessary parties to be included in the petition since they are allegedly party to the alleged oppressive acts and unfair discrimination. We were persuaded by this argument too. It was plain why they had to be added as parties.

This Court's Findings And Conclusions

F [34] These appeals were interlocutory appeals brought by the respective appellants in the face of a very clear judgment of an earlier Court of Appeal in this very same matter which had ordered the petition to be re-instated and heard on the merits.

G The High Court Judge was very correct to exercise her discretion to dismiss the second round of striking out applications on the ground she was bound by the judgment of the Court of Appeal and the Federal Court which in turn had dismissed the appellants' applications for leave to appeal. The intercession of the final award, being made after the Court of Appeal and the Federal Court's decisions, did not alter the essential nature of the interlocutory applications. The respective appellants had still to show a very clear and convincing case there the petitioner's case was obviously unsustainable. The case must be that it was not only not sustainable, but it must be obviously so. The earlier

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Court of Appeal had referred to *Bandar Builder Sdn Bhd & 2 Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36, a Federal Court decision as laying down the correct legal position. We agreed.

[35] There were of course some very importance issues raised in the submissions relating to the effect of the final award as an international award. There could very well be findings of fact which would be *res judicata* in a Malaysian Court hearing the petition, but realistically and properly this should be a matter to be fully argued when the petition is heard on its merits, on which matter we are not expressing any firm views one way or the other. This position applies as well *vis-à-vis* the larger question of whether an arbitration clause can oust the statutory jurisdiction under s. 181 of the Companies Act, whether wholly or in part. We were of the opinion these issues could not be realistically determined with finality in an interlocutory appeal. The relevance and applicability of the principles established in *Exeter City AFC Ltd v. Football Conference Ltd* [2004] EWHC and *Fulham Football Club (1987) Ltd v. Richards* [2012] 1 All ER 414, for example, can then be more fully ventilated when the petition is heard on the merits. In *Fulham Football Club*, the English Court of Appeal held, when discussing the s. 99, Companies Act, remedy of “unfair prejudice”, that “there was nothing in the scheme of those provisions which made the resolution of the underlying dispute inherently unsuitable for determination by arbitration.” The exact breadth of this view will require detailed evaluation to determine whether it can have the effect of ousting the statutory remedy under our very own s. 181, despite the final award now having been rendered by the Arbitral Tribunal.

[36] The appellants are of course free to raise these very same grounds in the hearing of the petition and still rely on s. 36(1) of the Arbitration Act 2005 which provides:

36(1) An award made by an Arbitral Tribunal pursuant to an arbitration agreement shall be final and binding on the parties and may be relied upon by any party by way of defence, set-off or otherwise in any proceeding in any court.

[37] It will be up to the appellants to persuade the High Court hearing the petition on which parts of the final award are *res judicata*. For the present, we were not persuaded that the dismissal

A of the appeals would occasion any immediate prejudice to the appellants, or that the hearing of the petition on the merits would be an exercise in futility.

B **[38]** For the reasons discussed above we were unanimous in entering judgment as follows:

- (a) Appeal No. W-02(IM)-696-03-2012 dismissed with costs of RM30,000 to be paid by the appellants to the respondent;
- C** (b) Appeal No. W-02(IM)-733-04-2012 dismissed with costs of RM5,000 to be paid by the appellants to the respondent; and
- (c) Appeal No. W-02(IM)-816-04-2012 dismissed with costs of RM5,000 to be paid by the appellant to the respondents.

D **[39]** The respective deposits were ordered to be refunded to the appellants. We affirmed the decision of the High Court dated 15 March 2012.

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